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8
9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 BRIESE USA, INC.,

13
14 Plaintiff,

15 v.

16
17 BRIESE LICHTTECHNIK
18 VERTRIEBS GmbH, *et al.*,

19 Defendants,

20
21 _____
22 and consolidated actions.
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25
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27
28

) CASE NO.: CV 07-2735 GHK (CWx)

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **PLAINTIFF'S MOTION FOR**
) **PRELIMINARY INJUNCTION**

) **Date: None**

) **Time: None**

) **Place: Courtroom 650**

) **Judge: Honorable George H. King**

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1 **I. INTRODUCTION**

2 Plaintiff Briese USA, Inc. moves for an order to preliminarily enjoin use of
3 the Briese and Briese USA marks by Defendants as set forth in the accompanying
4 proposed preliminary injunction. The facts in this case as developed at the recent
5 depositions show that Briese USA has exclusive rights to rent, sell and to represent
6 and promote the Briese name in the U.S. Further, Briese USA has established a
7 likelihood of success on the merits, irreparable harm and that the balance of
8 hardships tip in Briese USA's favor.

9 Moreover, as explained in Section XI herein, depositions revealed that
10 Defendant Mr. Briese's purported inability to travel by air in 2007 was misleading
11 at best. In fact, Mr. Briese obtained a permission letter from Dr. Kuck to travel by
12 air back in July 2007. This is the same Dr. Kuck whose letter was the basis for
13 arguing Mr. Briese should not travel by air due to alleged health issues. This lack
14 of candor by Defendants has delayed this action for months while Mr. Briese
15 purportedly was recuperating. Such delay has further damaged and irreparably
16 injured Plaintiff's customer good and reputation and is a further reason the
17 requested preliminary injunction should be granted.

18 The supporting transcripts of the depositions are attached to the
19 accompanying declaration of Edward C. Schewe as McIlroy Depo (Ex. 1),
20 nonconfidential Langton Depo (Ex. 2), Ortiz Depo (Ex. 3), Belkin Depo (Ex. 4),
21 Devlin Depo (Ex. 5), Malykont Depo (Ex. 6) and HW Briese Depo (Ex. 7) with
22 additional Exhibits 8 and 9 referenced herein. The confidential portions of the
23 deposition transcripts are separately filed under seal in a second Schewe declaration
24 as confidential Langton Depo with deposition Exhs. 114-117 (Ex. 10) and J. Briese
25 Depo (Ex. 11). Pursuant to the Court's February 5, 2008 Order, Plaintiff also
26 concurrently submits true and correct copies of videos of the deposition transcripts.

1 **II. THE AGREEMENT BETWEEN THE PARTIES**

2 The testimony of Ms. Lee Anne McIlroy, Mr. Brent Langton and Mr. Sergio
3 Ortiz demonstrates that the parties did reach an enforceable verbal agreement with
4 Mr. Hans Werner Brieese whereby Brieese USA would have exclusive rights in the
5 U.S.

6 **A. The testimony of Ms. McIlroy.** Ms. McIlroy was the Vice President
7 of Brieese USA, Inc. and has personal knowledge of the agreement reached between
8 the parties in New York in the Fall of 1998 or 1999. Ms. McIlroy was very much
9 involved at the beginning of all of the negotiations of the rental and purchase and
10 the establishment of Brieese USA starting in the late '90s, 1998, fall of 1998 and
11 1999. McIlroy Depo at 8:12-23, Ex. 1. Ms. McIlroy was previously married to Mr.
12 Brent Langton. McIlroy Depo at 8:5-7.

13 Ms. McIlroy's testimony is that Mr. Langton and Ms. McIlroy were
14 scheduled to meet with Mr. and Mrs. Brieese at a photo exposition in New York City
15 in the Fall of 1998 or 1999. Prior to that meeting, Ms. McIlroy and Mr. Langton
16 had begun purchasing Brieese lighting equipment to rent in the United States.
17 McIlroy Depo at 11:3-11.

18 Ms. McIlroy and Mr. Langton in fact purchased Brieese lighting equipment
19 taking out bank loans based on emails and faxes sent back and forth between Brieese
20 GmbH and Ms. McIlroy and Mr. Langton in California. McIlroy Depo at 12:23-
21 13:2; McIlroy Depo at 16:10-15; McIlroy Depo at 17:17-25. Ms. McIlroy and
22 Mr. Langton had leveraged a lot of money to purchase the equipment and they had
23 no need to purchase the equipment other than to establish Brieese USA. McIlroy
24 Depo at 17:7-10.

25 Ms. McIlroy testified as follows:

26 Q. (by Mr. Schroeder): Based on the communications that you
27 had with Brieese in Germany, did you have an understanding before the
28 meeting as to what sort of relationship you expected to evolve?

1 A. (by Ms. McIlroy): Yes. Before we went to New York,
2 yes.

3 Q. What was that expectation?

4 A. (by Ms. McIlroy): I had an expectation. The expectation
5 was that Brent and I would have exclusive North American rights to
6 rent out that equipment and to establish the Briesse name in the United
7 States. That expectation was confirmed after I met the Brieses in New
8 York.

9 Q. Your understanding prior to the meeting was based on
10 communications that came to you from Germany?

11 A. (by Ms. McIlroy): That came to the office from Germany
12 and from the bank, yes.

13 Q. You would have exclusive right to rent?

14 A. (by Ms. McIlroy): Rent, sell and to represent.

15 Q. Who were these communications in Germany with?

16 A. (by Ms. McIlroy): With the Brieses. Briesse Lichttechnik
17 Vertriebs.

18 Q. With Mr. or Mrs. or both of them?

19 A. (by Ms. McIlroy): Both. Both of them. The exclusivity
20 was mostly Mr. Briesse.

21 McIlroy Depo at 13:18 - 14:21.

22 At the dinner meeting in New York, the parties reached an oral agreement
23 (McIlroy Depo at 24:7-11) whereby Briesse USA would have exclusive North
24 American rights. See McIlroy Depo at 24:12 - 28:10. According to Ms. McIlroy,
25 the agreement is Briesse USA would be responsible for and liable for any
26 modifications to the equipment, Briesse USA would be credited and acknowledged
27 for any changes to the equipment, Mr. Briesse would not sell or rent Briesse
28 equipment to anyone else in the United States, Briesse USA would have exclusive

1 North American rights and that the parties did not need to memorialize this because
2 a handshake was good enough. See McIlroy Depo at 28:18 - 29:12. Brieze USA
3 was given exclusive North American rights to rent, sell and to represent and
4 promote the Brieze name. McIlroy Depo at 31:6-10.

5 Ms. McIlroy further testified:

6 Q. Are there any other witnesses to this oral agreement that
7 you reached at dinner in New York other than the people we have
8 talked about, that would be yourself, Mr. Langton, Mr. and Mrs. Brieze
9 and this fifth person?

10 A. (by Ms. McIlroy): No. I'm here to just testify on what Mr.
11 Brieze promised me. And he gave me a very clear assurances that I
12 needed at that time in my life, that if I was going to sign my name for
13 all these loan documents and make such a big purchase, that I would
14 have a modicum of safety, security, stability to my future, I'm here to
15 say he gave me those assurances. **If he's saying now he didn't, he's**
16 **not being truthful . . . He said a handshake was good enough. He**
17 **shook Brent's hand and he shook my hand. He made me a**
18 **promise.**

19 McIlroy Depo at 61:17 - 62:11 (emphasis added).

20 Ms. McIlroy testified that she was assured that Brieze USA could in fact
21 make any changes needed to be made to the equipment:

22 Q. (by Mr. Schroeder): When you arrived at this meeting in
23 New York, you had in your mind the contours of what you think the
24 agreement ought to be, correct?

25 A. (by Ms. McIlroy): No, I had what Mr. Brieze said. I had
26 documents -- the contours of my mind; its like a song, Windmills of
27 My Mind. No, I don't operate that way. I had loan docs. I had faxes.
28 I had emails. I had phone calls. I had conversations. I had a whole

1 day at a trade show when I arrived. It wasn't just the contours of my
2 mind. It was clear. It was clear for me that we were going to be
3 making -- we had already made a significant purchase, and that
4 changes needed to be made to the equipment. Mr. Briese wasn't
5 willing to make those changes to the equipment. I was concerned
6 because that's a lot of money to spend on equipment that we needed to
7 use in the United States. **I was assured that we, could in fact, make**
8 **any changes we want and still use the Briese name.**

9 McIlroy Depo at 62:12 - 63:6 (emphasis added).

10 **B. The testimony of Mr. Langton.** Mr. Langton is the owner and
11 president of Briese USA, Inc. Langton Depo at 8:5-6, Ex. 2. Mr. Langton testified
12 that the parties reached an oral agreement following the pdn show in New York in
13 1998 or 1999. Langton Depo at 30:17-32:23. Mr. Briese introduced Mr. Langton
14 and Ms. McIlroy to the predecessor, Mr. Brown, as his new North American
15 representatives. Langton Depo at 33:21-23.

16 The terms of the agreement were that Mr. Langton would have to deal with
17 the electrical problems with the equipment (Langton Depo at 35:1-14), Mr. Langton
18 was to establish and give the name a position in the marketplace and if he did this
19 he would reap the benefits (Langton Depo at 36:13-17) and that Mr. Langton was
20 the North American representative and importer of the equipment. Langton Depo
21 at 36:17-19.

22 Anything that has to do with the product in America, Mr. Langton was to
23 handle because nobody else was handling it. Langton Depo at 38:23-25. What this
24 meant was that Mr. Langton had exclusive distribution rights for Briese products in
25 the United States. See Langton Depo at 71:22-72:10. Mr. Langton testified that
26 this was a handshake agreement (Langton Depo at 43:19-22) and no writing was
27 necessary. Langton Depo at 44:1-8.

28

1 **C. The testimony of Mr. Ortiz.** Mr. Ortiz is part owner of Brieze USA,
 2 and does research, development, repairs and co-manages the office for Brieze USA.
 3 Ortiz Depo at 7:16-21, Ex. 3. Mr. Ortiz frequently flew to Germany on behalf of
 4 Brieze USA at least one trip every two months, and sometimes twice a month, to sit
 5 down and talk strategy with Mr. Brieze, to talk about what was going on and to talk
 6 about equipment purchases by Brieze USA. Ortiz Depo at 159:9-14. Mr. Ortiz
 7 testified that Mr. Brieze stated: **"If you guys want to keep your exclusivity, you**
 8 **have to buy more equipment. I need you to buy next year -- I need you to buy more**
 9 **equipment. I'm having problems. You have to help me out."** Ortiz Depo at 159:16-
 10 20 (emphasis added). Mr. Ortiz agreed to make such purchases, and Brieze USA
 11 did in fact end up making two or three substantial purchases of equipment to help
 12 out Mr. Brieze even though Brieze USA did not need the equipment. Ortiz Depo at
 13 160:10-15.

14 15 **III. APPLICABLE LEGAL STANDARDS**

16 The purpose of preliminary injunctive relief is to preserve the *status quo*
 17 pending a determination of the action on the merits. *Chalk v. U.S. Dist Ct.*, 840
 18 F.2d 701, 704 (9th Cir. 1988). "The status quo *ante litem* refers not simply to any
 19 situation before the filing of the lawsuit, but instead to the last uncontested status
 20 which preceded the pending controversy." *GoTo.Com v. Walt Disney Co.*, 202 F.3d
 21 1199, 1210 (9th Cir. 2000).

22 A party seeking preliminary injunctive relief must show either: (1) a
 23 combination of probable success on the merits and the possibility of irreparable
 24 injury or (2) that serious questions are raised and the balance of hardships tips
 25 sharply in his favor. *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, 475
 26 F.Supp.2d 995, 1000 (CD Cal. 2007).

27 To demonstrate a likelihood of success on the merits in a trademark action, a
 28 party seeking injunctive relief must prove (1) ownership of a valid trademark and

1 (2) a likelihood that the allegedly infringing mark will be confused with its own
2 mark. See *Omega Nutrition USA v. Spectrum Marketing*, 756 F.Supp. 435, 438
3 (ND Cal. 1991) (preliminary injunction granted in favor of exclusive distributor).

4 The parties' agreement was reached in New York. Under New York law,
5 oral agreements are binding and enforceable absent a clear expression of the parties'
6 intent to be bound only by a writing. *Wisdom Import Sales Co., LLC v. LaBatt*
7 *Brewing Co., Ltd.*, 339 F.3d 101, 109 (2d Cir. 2003) citing *R.G. Group, Inc. v. The*
8 *Horn & Hardart Co.*, 751 F.2d 69, 74-75 (2d Cir. 1984) (agreement does not lack
9 "formality" simply because the parties may not have reduced its terms to writing).
10 For these and the following reasons, Plaintiff is likely to succeed on its claim:
11

12 **IV. PLAINTIFF OWNS THE BRIESE MARK IN THE U.S.**

13 In *Sengoku Works Ltd. v. RMC International, Ltd.*, 96 F.3d 1217 (9th Cir.
14 1996), the Ninth Circuit held that an exclusive distributor may acquire trademark
15 rights superior to those of a manufacturer. The courts will look first to any
16 agreement between the parties regarding trademark rights. 96 F.3d at 1221. The
17 other factors include:

- 18 (1) which party invented and first affixed the mark onto the product;
- 19 (2) which party's name appeared with the trademark;
- 20 (3) which party maintained the quality and uniformity of the product;
- 21 (4) with which party the public identified the product and to whom
22 purchasers made complaints;
- 23 (5) which party possesses the goodwill associated with the product, or which
24 party the public believes stands behind the product.
25 96 F.3d at 1220.

26 Applying these factors, courts have found that an exclusive distributor had
27 acquired superior trademark rights over the manufacturer and granted a preliminary
28 injunction in favor of the distributor. See *Omega Nutrition USA v. Spectrum*

1 *Marketing*, 756 F.Supp. 435, 438 (ND Cal. 1991); *Tactica International, Inc. v.*
 2 *Atlantic Horizon Int'l*, 154 F.Supp.2d 586, 599-601 (SDNY 2001).

3 **(A) Agreement between the parties regarding trademark rights.** This
 4 factor favors Plaintiff. Briese USA has exclusive North American rights to rent,
 5 sell and to represent and promote the Briese name. McIlroy Depo at 31:6-10.
 6 Briese USA could make any changes Briese USA wanted to the equipment and still
 7 use the Briese name. McIlroy Depo at 62:12 - 63:6. Mr. Ortiz testified that Mr.
 8 Briese admitted to him that Briese USA has exclusivity and that Briese USA has in
 9 fact purchased additional equipment when requested. Ortiz Depo at 159:16-20.

10 **1. Which party invented and first affixed the mark onto the product and**
 11 **with services.** Defendant originated the mark Briese on lighting equipment in
 12 Germany based on the surname of Defendant Mr. Hans Werner Briese.

13 **2. Which party's name appeared with the trademark.** This factor
 14 favors Briese USA for equipment, for equipment rental and for answering incoming
 15 customer repair calls. For the equipment, Mr. Langton testified that every piece of
 16 equipment is labeled to let people know where to bring it back to if it gets lost.
 17 Langton Depo at 241:11-21 and depo Exh. 115 (Ex. 10) showing the labels with the
 18 Briese USA New York address. Briese USA also has cow tags for equipment and
 19 other ways for labeling the equipment that have the Briese USA New York address.
 20 Langton Depo at 242:2-243:4 and depo exh. 116.

21 Regarding equipment rental, the rental price sheets used by Briese USA are
 22 shown in depo exh. 114 and these list the Briese USA New York and Los Angeles
 23 addresses written on them. Langton Depo at 239:17 -241:2 and Exh. 114.

24 Regarding services, Mr. David Malykont answers incoming calls at the
 25 Briese USA Los Angeles office. Malykont Depo at 25:12-14; 8:21-25. This
 26 includes calls from customers who have a problem with a piece of equipment.
 27 Malykont Depo at 21:17-25. Mr. Malykont answers incoming calls "Briese USA".
 28

1 Malykont Depo at 25:12-16, Ex. 6. In contrast, Defendant Brieese GmbH has never
2 had an office, a studio or any employees in the U.S. HW Brieese Depo at 17:5-16,
3 Ex. 7.

4 **3. Which party maintained the quality and uniformity of the product**
5 **and services.** This factor supports Brieese USA. Mr. Sergio Ortiz of Brieese USA
6 maintains the quality and uniformity of the products that Brieese USA rents out.
7 Ortiz Depo at 111:13-112:1. This is further supported by the testimony of Mr.
8 David Devlin and Mr. James Belkin as follows:

9 **Mr. David Devlin.** Mr. Devlin is a motion picture gaffer. Devlin Depo at
10 7:18-19, Ex. 5. A gaffer is a lighting director who specifies and implements
11 lighting designs. Devlin Depo at 10:2-3. Mr. Devlin works on motion pictures
12 (Devlin Depo at 8: 18-19) and has worked free-lance in film commercial production
13 and in music video production. Devlin Depo at 9:1-2. Mr. Devlin testified he has
14 been working with Steven Spielberg primarily for the last thirteen years (Devlin
15 Depo at 9:10-11) and worked on films including Jerry McGuire, The Lost World,
16 Saving Private Ryan, War of the Worlds and Indiana Jones. Devlin Depo at 9: 6-9.
17 Mr. Devlin also works as a still photography lighting director and has since 1998.
18 Devlin Depo at 9:13-24.

19 Mr. Devlin first became aware of Brieese lighting equipment in 2002 through
20 his work with a photographer. Devlin Depo at 12:8-12. Mr. Devlin has always
21 seen Brieese USA as the source of Brieese equipment. Devlin Depo at p. 14:19-15:1.
22 If Mr. Devlin needed repairs for the Brieese equipment, had to rent Brieese equipment
23 in the U.S., or needed replacement parts for Brieese equipment, he would go to
24 Brieese USA. Devlin Depo at 15:2-24.

25 **Mr. James Belkin.** Mr. Belkin is a Director of Photography hired to create
26 images for network television with some of his work created to be shown at Regal
27 Cinemas. Belkin Depo at 7:14-17, Ex. 4. Mr. Belkin does promos for NBC, TNT,
28 TBS, The Discovery Channel, The Learning Channel and The Sundance Channel.

1 Belkin Depo at 7:8-12. Mr. Belkin graduated from Syracuse University in 1977,
2 moved out to Hollywood in 1984 and was a Director of Photography by 1987.

3 Belkin Depo at 7:19-22.

4 Mr. Belkin has used Brieze lighting equipment and his first use was in 1999
5 when he was doing a big project for NBC. Belkin Depo at 8:20 - 9:3. Mr. Belkin
6 has used the Brieze lighting every year since 1999. Belkin Depo at 11:12. Mr.
7 Belkin's understanding has been that the source of the Brieze lighting was Brieze
8 USA's president, Brent Langton (Belkin Depo at 11:1-8; 14:15-20) and that Mr.
9 Langton is Brieze. Brieze Lighting in New York and LA. Belkin Depo at 14:21-23.
10 Mr. Belkin testified that Mr. Langton maintains the quality of the product Belkin
11 uses (Belkin Depo at 16:6-16), Mr. Langton stands behind the product Belkin
12 acquires (Belkin Depo at 16:17-17:1) and that the service provided by Brieze USA
13 is "Remarkable. Just absolutely remarkable . . . Top to bottom it's the best
14 service". Belkin Depo at 19:13-22.

15 **4. With which party the public identified the product and services and**
16 **to whom purchasers made complaints.** This factor supports Brieze USA based
17 on the testimony of Mr. Devlin and Mr. Belkin. Mr. Devlin has always seen Brieze
18 USA as the source of Brieze equipment. Devlin Depo at p. 14:19-15:1. If Mr.
19 Devlin needed repairs for the Brieze equipment, had to rent Brieze equipment in the
20 U.S., or needed replacement parts for Brieze equipment, Mr. Devlin would go to
21 Brieze USA. Devlin Depo at 15:2 to 15:24.

22 Mr. Belkin testified that he understood Brieze USA's President Mr. Langton
23 as the source of the Brieze lighting (Belkin Depo at 11:1-8; 14:15-20) and that Mr.
24 Langton is Brieze. Brieze Lighting in New York and LA. Belkin Depo at 14:21-23
25 (emphasis added). Mr. Belkin testified that Mr. Langton maintains the quality of
26 the product Belkin uses (Belkin Depo at 16:6-16), Mr. Langton stands behind the
27 product Belkin acquires (Belkin Depo at 16:17-17:1) and that the service provided
28

1 by Brieze USA is "Remarkable. Just absolutely remarkable . . ." Belkin Depo at
2 19:13-22.

3 **5. Which party possesses the goodwill associated with the product and**
4 **services, or which party the public believes stands behind the product and**
5 **services.** This factor supports Brieze USA. When someone rents Brieze lighting
6 equipment in the U.S., they contact either Dave Malykont or Brent Langton of
7 Brieze USA. See Ortiz Depo at 112:2-5. As Mr. Ortiz testified, "Ask any
8 photographer who handles Brieze equipment in Los Angeles and they are going to
9 tell you immediately that it's us". Ortiz Depo at 158:3-6. Both Mr. Devlin and Mr.
10 Belkin testified that they view Brieze USA as the source of the Brieze equipment
11 and that Brieze USA stands behind the product and services. See Devlin Depo at
12 14:19-15:24; Belkin Depo at 16:6-17:1; 19:13-19:22. Mr. Langton received a call
13 from Sun Studios about a broken Brieze equipment head and even though Brieze
14 USA did not supply that piece of equipment, Brieze USA provided Sun Studios
15 with a replacement head. Langton Depo at 247:19-248:19.

16
17 **V. PLAINTIFF ESTABLISHED SECONDARY MEANING**

18 Secondary meaning is "the mental association by a substantial segment of
19 consumers and potential consumers between the alleged mark and a single source
20 of the product." *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354 (9th
21 Cir. 1985) (citations omitted). See also *Miller v. Glenn Miller Productions, Inc.*,
22 454 F.3d 975, 991 (9th Cir. 2006) (secondary meaning is the consumer association
23 of the mark with a particular source or sponsor).

24 Factors considered in determining whether a secondary meaning has been
25 achieved include: (1) whether actual purchasers of the product bearing the mark
26 associate the mark with the producer, (2) the degree and manner of advertising
27 under the mark, (3) the length and manner of use of the mark, and (4) whether use
28

1 of the mark has been exclusive. *Id.* citing *Committee for Idaho's High Desert v.*
 2 *Yost*, 92 F.3d 814, 822 (9th Cir. 1996).

3 Here, Plaintiff has established secondary meaning based on the following
 4 evidence:

5 **1. Actual purchasers (Mr. Devlin and Mr. Belkin).**

6 **Mr. David Devlin.** Mr. David Devlin, a motion picture gaffer, testified:

7 Q. Over the time you have used Brieze equipment, what have
 8 you seen was the source of that equipment?

9 A. (by Mr. Devlin): Brieze USA. Even in London when we
 10 used it there, it was Brieze USA. **Previous to this deposition, I**
 11 **wasn't even aware there was another source for Brieze lighting.**

12 Devlin Depo at p. 14:19 - 15:1 (emphasis added).

13 If Mr. Devlin needed repairs for the Brieze equipment, had to rent Brieze
 14 equipment in the U.S., or needed replacement parts for Brieze equipment, he would
 15 go to Brieze USA. Devlin Depo at 15:2 to 15:24. Mr. Devlin also testified that if
 16 he needed something done such as a new piece of lighting equipment, they (Brieze
 17 USA) are "a hard charging company. Basically, whenever you need something to
 18 be someplace, they make it happen . . ." Devlin Depo at 15:2 to 15:24.

19 **Mr. James Belkin.** Mr. Belkin, the Director of Photography, has used
 20 Brieze lighting equipment since 1999 when he was doing a "mondo" (a big giant
 21 project) for NBC. Belkin Depo at 8:20-9:3. Mr. Belkin testified:

22 A. (by Mr. Belkin): . . . so I was doing a mondo for NBC, and a
 23 gaffer I knew, Ted Hayash, said "Hey, Jim, there's this new light out
 24 here called a Brieze light." And I go, "Oh, yeah?" Because I'm always
 25 up to see new things. And he said, "Do you mind if I -- I have Brent
 26 Langton. He's got these lights. Do you mind if he comes by just to
 27 show you?" So it was at Raleigh Stage 5, and when I went around the
 28 corner of the set, they were all lined up and lit. And first of all, I was

1 taken in by the shape of the shelves from behind. It was like, "Oh, this
2 is interesting." And then I walked around in front, and it was love at
3 first sight. And then I said, 'Stand in front of it.' And the quality of the
4 light, the skin tone, it was really, really, really beautiful, and I started
5 using them then. So I would say from 1999 until now I've been using
6 them extensively in many different fashions and forms . . .

7 Belkin Depo at 9:10 - 10:2.

8 Mr. Belkin has used the Briese lights every year since 1999. Belkin Depo at
9 11:12. Mr. Belkin's understanding has been that the source of the Briese lighting
10 was Brent Langton (Belkin Depo at 11:1-8; 14:15-20) and the company that Mr.
11 Langton runs is Briese. Briese Lighting in New York and LA. Belkin Depo at
12 14:21-23.

13 **2. Plaintiff's Advertising under the Mark.** Briese USA extensively
14 advertised under the mark to promote Briese USA's business. McIlroy Depo at
15 51:20. The advertising included press releases, advertisements in photography
16 publications, trade shows in Los Angeles and New York, holding demonstrations in
17 Los Angeles and New York, free rentals of the lights to get people familiar with the
18 equipment and also rented the lights. McIlroy Depo at 49:24 -50:10. Mr. Langton
19 went to universities and art schools that focused on photography and did free
20 demonstrations and Briese USA did make some modifications to the lights so they
21 would work on set. McIlroy Depo at 50:11-16. On the night after the parties
22 reached their oral agreement, Briese USA held a party at Briese USA's New York
23 office and introduced the launching of Briese USA. McIlroy Depo at 55:16-19;
24 71:15-72:1.

25 Mr. Ortiz also has given away promotion items with "Briese" name on them
26 and Briese USA has from day one. Ortiz Depo at 109:22-111:9. Currently, Briese
27 USA's people are the advertising and Mr. Langton goes out and visits a client onset
28

1 at 5:00 till 10:00, helps them break it down, asks what happened and recommends
2 something. Langton Depo at 124:15-125:14.

3 **3. and 4. Length and manner of use and whether use has been**
4 **exclusive**. Briese USA had exclusive North American rights to rent, sell and to
5 represent and promote the Briese. McIlroy Depo at 31:6-10. According to Mr.
6 Langton, that relationship did not change until the end of 2006 when Mr. Briese
7 began to breach the parties' agreement. See Langton Depo at 27:16-24. Mr. Ortiz
8 testified that nobody has more full service than Briese USA. Ortiz Depo at 121:6-9.

9
10 **VI. DEFENDANT BRIESE GMBH FAILED TO ESTABLISH**
11 **SECONDARY MEANING AS REQUIRED**

12 In contrast, Defendant Briese GmbH failed to prove secondary meaning in
13 the mark "Briese" or the mark "Briese USA" at any time. The alleged senior user,
14 here Defendant Briese GmbH, must prove the existence of secondary meaning in its
15 mark at the time and place that the junior user first began use of that mark. See 2
16 McCarthy § 16:34, p. 16-57 to 16-60. See also *Carter-Wallace, Inc. v. Proctor &*
17 *Gamble Co.*, 434 F.2d 794 (9th Cir. 1970) (plaintiff failed to provide secondary
18 meaning in its mark at anytime including prior to defendant's use date). Professor
19 McCarthy states:

20 If the senior user cannot prove that its mark possessed secondary
21 meaning at the time defendant commenced its use, there can be no
22 infringement, for if there was no secondary meaning, there was no
23 likelihood of confusion when the junior user arrived on the scene.
24 2 McCarthy §16:34, p. 16-59.

25 Here, Defendant Briese GmbH cannot prove secondary meaning in the U.S.
26 in 1998 or 1999 when Plaintiff began using the Briese and Briese USA marks.
27 Defendant submitted no evidence of secondary meaning through any of its
28 witnesses or documents. Defendant's position is the complete antithesis of

1 secondary meaning in the U.S.: Defendant Briese GmbH has never had an office, a
2 studio or any employees in the U.S. HW Briese Depo at 17:5-16. Briese GmbH
3 has never done repair work in the U.S. J. Briese Depo at 56:21-25. Defendant
4 Briese GmbH has never used the term "Briese USA" in the United States. HW
5 Briese Depo at 17:17-19.

6 Ms. Lee Anne McIlroy testified that while he was aware of other lighting
7 equipment, she did not know about Briese. McIlroy Depo at p. 69:6-20. Although
8 Mr. Briese previously submitted two declarations in connection with Defendant's
9 motion, those declarations are not competent evidence of secondary meaning
10 because Mr. Briese testified that he has had nothing to do with sales for more than
11 20 years probably 22 years. HW Briese Depo at 76:17-77:7. Defendant cannot
12 establish secondary meaning at any time.

13 14 **VII. PLAINTIFF HAS ESTABLISHED A LIKELIHOOD OF CONFUSION**

15 In *AMF v. Sleekcraft Boats*, 599 F.2d 341, 348-349 (9th Cir. 1979), the Ninth
16 Circuit set forth a list of factors to be used in determining a likelihood of confusion:
17 the similarity of the marks, strength of Plaintiff's mark, relatedness of the goods,
18 marketing channels, evidence of actual confusion, defendant's intent, degree of
19 consumer care and likelihood of expansion of product lines.

20 The *Sleekcraft* factors all support a finding in favor of Plaintiff Briese USA.
21 The competing marks are similar. Both marks are "Briese" and Plaintiff uses
22 Briese USA with the dominant portion being "Briese".

23 Plaintiff's mark is a strong mark. Plaintiff established secondary meaning as
24 shown by the testimony of Mr. Dave Devlin and Mr. James Belkin. Plaintiff's mark
25 is strong for services. See Belkin Depo at 19:13-22 (explaining that the service
26 provided by Briese USA is "Remarkable. Just absolutely remarkable . . . Top to
27 bottom it's the best service."). Nobody has more full service than Briese USA.
28 Ortiz Depo at 121:6-9. Plaintiff extensively advertised and promoted the mark in

1 the U.S. as shown by the testimony of Ms. McIlroy and Mr. Langton. Plaintiff's
2 revenues have increased year to year since inception and have been extraordinary or
3 "off the charts" for 2006 and 2007 with new clients coming on board. See Langton
4 Depo at 120:24-121:18. Exhibit 117 reflects Plaintiff's revenue growth since 1998.
5 See Langton Depo at 243:11-15. These facts support a finding that Plaintiff's mark
6 is a strong mark.

7 The goods are related. Both are lighting equipment and related support
8 equipment. Plaintiff's rental, repair, grip and other services are related to lighting
9 equipment. The marketing channels are also the same, as Defendant wishes to sell
10 to photographers and cinematographers and Plaintiff rents and sells to
11 photographers and cinematographers. Defendant Mr. Brieze recently contacted a
12 customer of Brieze USA by email. See April 11, 2008 Langton Declaration at ¶ 2.

13 The factor of Defendant's intent favors Plaintiff. Mr. Ortiz has knowledge
14 that a former Brieze USA employee, Doyle Leeding, took equipment and possibly
15 other materials without permission to meet with Mr. Brieze in Germany in late
16 2006. Ortiz Depo at 116:10 -118:10. In deposition, Mr. Brieze confirmed the
17 October 2006 meeting in Germany with Mr. Leeding, confirmed that Mr. Leeding
18 brought a reflector skin and a flashtube but Mr. Brieze is not sure if Mr. Leeding
19 was still an employee of Brieze USA at that time. HW Brieze Depo at 48:25-53:17.
20 Mr. and Mrs. Brieze even tried attempted to entice Mr. Ortiz to open his own
21 "Brieze thing" in Los Angeles because Mr. Ortiz already knew how to service the
22 equipment. Ortiz Depo at 27:19-29:13.

23 The evidence of actual confusion supports Plaintiff. Mr. Langton testified
24 that in early 2008, an employee of Pier 59 was confused when he called Brieze
25 USA to come and pick up Brieze equipment at Pier 59 which was later discovered
26 to be equipment of Defendant Drive In. Langton Depo at 238:2-16.

27 The degree of consumer care favors Plaintiff because customers are reluctant
28 to change to something else and stick with what they perceive as a winning

1 combination. Langton Depo at 78:14-20. Likelihood of expansion of product lines
 2 favors Plaintiff because as stated above, Mr. and Mrs. Briese attempted to entice
 3 Mr. Ortiz to open his own "Briese thing" in Los Angeles.

4 5 **VIII. ANALYSIS OF THE DIFFERENT TYPES OF CONDUCT AT ISSUE**

6 In the August 7, 2007 order, the Court asked for briefing on different types of
 7 conduct engaged in by Plaintiff and whether there was a license, knowledge and/or
 8 there was acquiescence to this conduct. Each of these is discussed hereafter:

9 **(1) Business name Briese USA.** Defendant has known about and
 10 acquiesced to Plaintiff's use of Briese USA. Mr. Langton formed Briese USA after
 11 Mr. Briese asked him to help out on a patent infringement suit in the U.S. and Mr.
 12 Briese agreed that Mr. Langton could use that name to form a corporation. Langton
 13 Depo at 48:23-50:6. The former manager of Briese USA's New York office, Mr.
 14 Gino Zardo, visited Mr. Briese in Germany and Mr. Briese told Mr. Zardo that
 15 Brent Langton is the American representative and if he needed anything it's Briese
 16 USA, not Gino Zardo. Langton Depo at 236:5-237:2. Following the parties' dinner
 17 meeting in New York, Ms. McIlroy sponsored a party at Briese USA's New York
 18 offices with both Mr. Briese and Mrs. Briese in attendance whereby Briese USA
 19 welcomed the Brieses here. See McIlroy Depo at 71:15-72:1.

20 Both Mr. and Mrs. Briese introduced Mr. Ortiz and Mr. Langton as Briese
 21 USA at the Fotokina trade show in Cologne Germany in 2002/2003. Ortiz Depo at
 22 29:14-30:16. Mr. Briese introduced Mr. Ortiz as Brent Langton's partner and as
 23 Briese USA, the guys that run Briese in America. Ortiz Depo at 33:9-16.

24 **(2) Modification and subsequent rental of equipment purchased from**
 25 **Briese GmbH.** Defendant has known about and acquiesced to these activities.
 26 Ms. McIlroy and Mr. Langton testified that necessary modifications to the
 27 equipment were part of the parties' agreement. McIlroy Depo at 25:13 - 27:16;
 28 28:22-29:1; Langton Depo at 35:1-14. The parties discussed specific items that

1 needed modification with the equipment, including the European electrical system
2 that required the use of adapters in the U.S. and the noisy fan. McIlroy Depo at
3 25:19 - 26:15. These specific items were brought up with Mr. Briese (McIlroy
4 Depo at 26:16) and the agreement was that Briese USA would be responsible for
5 any modifications to the equipment, Briese USA would be liable for any
6 modifications and Briese USA would be credited and acknowledged for any
7 changes to the equipment. McIlroy Depo at 26:20 - 27:16; 28:22-29:1. Briese
8 USA could make any changes Briese USA wanted to the equipment and still use
9 the Briese name. McIlroy Depo at 62:12 - 63:6.

10 Mr. Sergio Ortiz testified that Mr. Briese is aware of all repairs that Mr. Ortiz
11 does. Ortiz Depo at 44:8-14. Mr. Ortiz repaired the original focus tube (Ortiz
12 Depo at 75:23-16 and Ex. 38) by modifying the original focus tube with his own
13 design. Ortiz Depo at 77:39-80:10. Mr. Ortiz then took his modified design part to
14 Briese GmbH in Germany, first showed it to the shop and then showed it to Mr.
15 Briese to which there was no objection. Ortiz Depo at 80:11-81:6. Mr. Briese
16 knew that Briese USA was renting out this modified focus tube. Ortiz Depo at
17 81:19-21. Mr. Briese told Mr. Ortiz "I don't want to deal with it any more. You
18 guys just do what you have to do." Ortiz Depo at 83:2-4.

19 Mr. Ortiz also made modifications to the connectors used on the inside of the
20 focus tube (See Ortiz Depo at 84:14-89:23 and Ex. 40) because the original parts do
21 not work. Ortiz Depo at 90:6-9. Mr. Briese knows that Briese USA is renting out
22 the modified parts. Ortiz Depo at 90:22-24. Mr. Ortiz showed Mr. Briese the
23 development of the prototypes from beginning to the end. Ortiz Depo at 90:25 -
24 91:2. Mr. Ortiz also modified the male connectors for the Briese bitube (Ortiz
25 Depo at 95:8-97:7 and Ex. 41) and Mr. Briese knew Briese USA was renting out
26 these modified parts. Ortiz Depo at 97:15-19.

1 Moreover, under the exhaustion doctrine, the right of a producer to control
2 distribution of its trademarked product does not extend beyond the first sale of the
3 product. *Sebastian Int'l v. Longs Drug Stores Corp.*, 53 F.3d 1073 (9th Cir. 1995)
4 As Professor McCarthy states, “[i]t would be absurd to hold that a manufacturer
5 could sell a branded product to a distributor without restriction and then tell the
6 distributor that it could not resell the branded goods without either paying for a
7 trademark “license” or removing the trademark.” 4 McCarthy § 25:41, p. 25-109.
8 Thus, not only did Defendant have knowledge of and acquiesce to these activities,
9 but the exhaustion doctrine would bar Defendant's right to control later distribution.

10 **(3) Use of the Briese mark in rental of equipment obtained from third**
11 **parties.** Briese GmbH has known about and acquiesced to Briese USA's rental of
12 new equipment and equipment obtained from third parties. For example, Mr. Ortiz
13 testified that the flash tube has always been a huge problem. Ortiz Depo at 54:24-
14 25 and Ex. 36. See also Ortiz Depo at 55:5 to 61:13. Mr. Ortiz told Mr. Briese that
15 he was going to design his own flash tube. Ortiz Depo at 61:12-16. Mr. Ortiz
16 brought his latest version of the flash tube to Mr. Briese's office, showed it to Mr.
17 Briese, sat down with Mr. Briese, went over it together and Mr. Briese told Mr.
18 Ortiz that the he thought the parts were fantastic. Ortiz Depo at 64:6-11. Mr.
19 Briese knew Mr. Ortiz was renting this out in the U.S. because Mr. Ortiz had
20 showed him three different incarnations throughout the span of a year. Ortiz Depo
21 at 64:21-65:5.

22 Mr. Ortiz designed a new umbrella mount. Ortiz Depo at 107:2-12 and Ex.
23 45. Mr. Ortiz came up with this new design after the original design from Briese
24 GmbH did not work when used in the U.S. See Ortiz Depo at 100:13-105:16. Mr.
25 Briese has known that Briese USA is renting out this new umbrella mount in the
26 United States. Ortiz Depo at 109:1-4. Mr. Ortiz has been making custom
27 equipment for Spielberg and for Madonna and a hand held 330 umbrella all of
28 which Mr. Briese is aware of. Ortiz Depo at 112:6-114:16. Mr. Briese knows that

1 Briese USA is renting out this new equipment based on the information from Mr.
2 Ortiz. See Ortiz Depo at 114:24-115:1.

3
4 **IX. A TRADITIONAL TRADEMARK PRIORITY ANALYSIS IS NOT**
5 **APPLICABLE IN A MANUFACTURER DISTRIBUTOR RELATIONSHIP**

6 In the Court's August 7, 2007 Order, the Court asked for further briefing as
7 to whether traditional priority analysis was appropriate in a manufacturer distributor
8 relationship. The answer to that question is no, a traditional priority analysis is not
9 appropriate for the following reasons.

10 In a dispute over priority of use for a mark requiring secondary meaning,
11 mere priority of use as for technical trademarks is insufficient. See 2 McCarthy §
12 16:34, p. 16-56. It is the party who first achieved trademark significance in the
13 mark through secondary meaning who is the senior user of such a mark. *Id.* As
14 Professor McCarthy states:

15 For secondary meaning marks, the issue of priority and
16 ownership is not which party first used the mark, but which party first
17 achieved secondary meaning in the mark. As the California Court of
18 Appeals stated:

19 [T]he basic problem appears to be a determination of which
20 title or name, regardless of its adoption in point of time, first
21 made a sufficient impact on a substantial segment of the
22 purchasing public that there thus arose the required association
23 between the title or name and its single source.

24 2 McCarthy § 16:34, p. 16-57, citing *Family Record Plan, Inc. v. Mitchell*, 172
25 Cal.App.2d 235, 342 P.2d 10 (2d Dist. 1959).

26 Second, there is secondary authority suggesting that the question of priority
27 is not implicated in a manufacturer distributor relationship. See Chestek, *Who*
28 *Owns The Mark? A Single Framework For Resolving Trademark Ownership*

1 *Disputes*, 96 Trademark Reporter 681, 697 (May 2006 - June 2006) ("The question
 2 of priority is simply not implicated, however, because both parties are claiming
 3 rights in the same single trademark property, either one that came into existence
 4 during the relationship or was pre-existing but then used jointly", citing *Liebowitz*
 5 *v. Elsevier Science Ltd.*, 927 F. Supp. 688, 695 (S.D.N.Y. 1996) and *Omega*
 6 *Nutrition U.S.A., Inc. v. Spectrum Mktg., Inc.*, 756 F. Supp. 435, 438 (N.D. Cal.
 7 1991). The author goes on to state: "The author suggests that, in ownership cases,
 8 the question should not be which of two parties has earlier use, but instead
 9 recognition that the dispute is over a single mark, which could only have one first
 10 use date, leaving the court to decide only which party is more entitled to its
 11 continued use." *Chestek*, 96 Trademark Reporter at 697.

12 Here, mere priority of use for a mark such as Briese, a surname, is not
 13 controlling. As discussed above, Plaintiff was the party who first achieved
 14 trademark significance in the mark through secondary meaning and it is Plaintiff
 15 who has superior rights to the Briese mark.

16 17 **X. THE MERGER RULE IS INAPPLICABLE AND UNNECESSARY TO** 18 **THE PRESENT CASE**

19 In the August 7, 2007 order, the Court asked for briefing on the merger rule
 20 and whether the merger rule applies in view of Plaintiff's previous argument that
 21 Plaintiff has superior rights in the mark based on alleged senior use and a later grant
 22 of exclusive rights by Mr. Briese. The merger rule does not apply for the following
 23 reasons

24 As stated in *McCarthy*, under the merger rule, if: (1) party Alpha uses the
 25 mark and later becomes a licensee of Beta under the same mark; and (2) the Alpha-
 26 Beta License ends; then (3) Alpha cannot rely upon its prior independent use as a
 27 defense against an infringement claim brought against it by Beta. Alpha's prior
 28

1 trademark rights were "merged" with that of Beta and inured to the benefit of Beta.
 2 4 McCarthy § 25:32, p. 25-84.

3 The argument of Plaintiff was not directed to prior use, but to the issue of
 4 acquiring secondary meaning first. As discussed above, it is Plaintiff who "first
 5 achieved trademark significance in the mark through secondary meaning who is the
 6 senior user of the mark." See 2 McCarthy § 16:34, p. 16-56. Defendant failed to
 7 prove secondary meaning at the time and place that Plaintiff first began use of the
 8 Briese mark as required. See 2 McCarthy § 16:34, p. 16-57 to 16-60. Thus, the
 9 merger rule does not apply and Plaintiff's argument directed to Plaintiff's superior
 10 rights is subsumed under the secondary meaning analysis discussed above in
 11 Sections Four and Five.

12
 13 **XI. PLAINTIFF HAS DEMONSTRATED IRREPARABLE HARM AND**
 14 **ANY DELAY SHOULD BE ATTRIBUTED TO DEFENDANT'S**
 15 **MISLEADING ASSERTIONS THAT DEFENDANT HW BRIESE'S**
 16 **HEALTH DID NOT ALLOW HIM TO TRAVEL BY AIR IN 2007**

17 Plaintiff's customer goodwill and reputation are being injured currently and
 18 Defendant never disclosed that Mr. Briese in fact got special permission for air
 19 travel from the same doctor whose letter was the basis for arguing Mr. Briese could
 20 not travel to Los Angeles for cross examination. Once a plaintiff has established a
 21 likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer
 22 irreparable harm if injunctive relief is not granted. *Vision Sports, Inc. v. Melville*
 23 *Corporation*, 888 F.2d 609, 612 (9th Cir. 1989).

24 Intangible injuries such as damage to goodwill can constitute irreparable
 25 harm. See *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944
 26 F.2d 597, 603 (9th Cir. 1991) (irreparable harm established from violation of
 27 covenant not-to-compete where intangibles like advertising efforts and goodwill
 28 were injured). Business goodwill includes a company's reputation. *Premier*

1 *Nutrition, Inc. v. Organic Food Bar, Inc.*, 475 F.Supp.2d 995, 1007 (CD Cal. 2007)
 2 citing *WMX Techs v. Miller*, 80 F.3d 1315, 1325 (9th Cir. 1996).

3 Here, the evidence shows that Plaintiff owns the Briese and Briese USA
 4 marks and is being irreparably harmed by Defendant's conduct. As shown by the
 5 currently filed declaration of Mr. Brent Langton, this includes Defendant's recent
 6 email to a Briese USA customer and the recent unauthorized rental activities of Eric
 7 Larson. See April 11, 2008 Langton Declaration at ¶¶ 2-3.

8 Further, Mr. Ortiz testified exclusive rights in the U.S. are important to
 9 Briese USA and that Briese USA has spent a considerable amount of money
 10 developing the Briese trademark here in America. See Ortiz Depo at 115:10-116:6.

11 Mr. Ortiz testified that Mr. Eric Larson is not authorized to rent out Briese
 12 equipment in the U.S. See Ortiz Depo at 121:18-122:20. Mr. Ortiz has knowledge
 13 that a former Briese USA employee, Doyle Leeding, took equipment and possibly
 14 other materials without permission to meet with Mr. Briese in Germany in late
 15 2006. Ortiz Depo at 116:10 -118:10. Mr. Briese confirmed in his deposition the
 16 October 2006 meeting in Germany with Mr. Leeding. See HW Briese Depo at
 17 48:25-53:17.

18 **A. The Misleading Assertions by Defendants of "Doctor's Orders".**

19 Defendant Mr. Briese did get a special permission letter from his doctor to travel by
 20 air in 2007. Defendants never so advised the Court of this fact. Any delays in
 21 seeking preliminary injunctive relief since July 2007 should be attributed solely to
 22 Defendants. As the Court will recall, Defendants asserted that Mr. Briese was
 23 unable to travel by air for cross examination at the August 8, 2007 hearing due to
 24 alleged health issues. Plaintiff did its own investigation and reported to the Court
 25 in the Joint Report filed November 13, 2007 that Mr. Briese did in fact travel by air
 26 to the Maldives in July 2007.

27 Now, the recent deposition of Mr. Briese revealed that the alleged inability to
 28 fly was completely unfounded. Mr. Briese received special permission from his

1 doctor to fly to the Maldives in July 2007. HW Brieese Depo at 72:2-18. This
2 special permission letter is in writing and Mr. Brieese recalls that it is a one page
3 document. HW Brieese Depo at 72:19 - 73:7. This special permission was from the
4 same Dr. Kuck whose other letter was the basis for arguing Mr. Brieese could not
5 travel by air. See HW Brieese Depo at 72:13-15. Why wasn't this other Dr. Kuck
6 letter disclosed? In fact, Mr. Brieese was not even aware that there had been an
7 explicit order that he appear for cross examination. HW Brieese Depo at 70:25-72:3.
8 Defendant has not produced this one page permission letter during discovery
9 despite Plaintiff's Request for Production No. 31 that calls for such documents. See
10 Schewe Decl. Ex. 8 (2/5/2008 Discovery Order) and Schewe Decl. Ex. 9
11 (Defendant's Responses to First Set of Requests). Any delay from July 2007 to the
12 present should not be counted against Plaintiff in moving for injunctive relief.
13 Plaintiff respectfully suggests that Defendants' lack of candor, which has delayed
14 this case for months and caused hardship and expense to Plaintiff, should further
15 support the entry of the requested preliminary injunction.

16 17 **XII. THE BALANCE OF HARDSHIPS FAVORS PLAINTIFF**

18 This factor favors Plaintiff. Plaintiff has made a strong showing of probable
19 success on the merits and the possibility of irreparable injury. Plaintiff has built up
20 its business with increasing revenues each year and has established itself in the U.S.
21 as supported by not only the testimony of party witnesses but also by the testimony
22 of third party witnesses Mr. Devlin and Mr. Belkin. In contrast, Defendant Brieese
23 GmbH has never had an office, a studio or any employees in the U.S. and will
24 suffer no hardship from the injunction.

25 26 **XIII. THE PUBLIC INTEREST FAVORS PLAINTIFF**

27 The public interest supports the preliminary injunction requested by Plaintiff.
28 The public has an interest in having safe reliable equipment available as provided

1 by Brieze USA and in not being confused over the source of the equipment that is
2 safe and reliable. In addition, the public has an interest in seeing that commercial
3 agreements are honored. See *Caterpillar, Inc. v. Jerryco Footwear*, 880 F.Supp.
4 578, 593 (CD Ill 1994) ("The public has an interest in seeing that parties that enter
5 into commercial agreements honor those agreements and be held accountable when
6 they fraudulently seek to evade judgment of the Court."). Here, the public has an
7 interest in seeing that Defendant honor its agreement with Brieze USA.

8 9 **XIV. BOND REQUIREMENT**

10 Fed.R.Civ.P. 65(c) provides, in relevant part, that the amount of the bond is
11 for the payment of costs of damages suffered by the enjoined party later found to
12 have been wrongfully enjoined. Plaintiff has made a strong showing of probable
13 success on the merits and the possibility of irreparable injury and respectfully asks
14 the Court to require only a nominal bond of \$1000.

15 16 **XV. CONCLUSION**

17 Plaintiff's motion should be granted. The testimony of Ms. McIlroy, Mr.
18 Langton, Mr. Ortiz, Mr. Malykont, Mr. Devlin and Mr. Belkin and the evidence set
19 forth herein of ongoing irreparable harm and of Defendant's misleading assertion
20 that Defendant Mr. Brieze was unable to travel by air in 2007 support the grant of
21 the requested preliminary injunction concurrently submitted.

22 Respectfully submitted,

23 LAUSON & SCHEWE LLP

24
25 Dated: April 14, 2008

By: 

Edward C. Schewe

Robert J. Lauson

Attorneys for Plaintiff/

Counterclaim Defendant

BRIESE USA, INC.

PROOF OF SERVICE

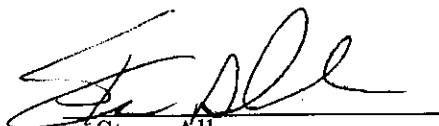
I am over the age of eighteen (18) years, employed in the County of Los Angeles, and not a party to the above-entitled action. My business address is 1600 Rosecrans Ave 4th Floor, Manhattan Beach, CA 90266

On April 14, 2008, I served a true and correct copy of the foregoing document addressed as follows to:

**Robert Schroeder, Esq.
A Eric Bjorgum, Esq.
Sheldon Mak Rose & Anderson
100 E. Corson Street
Pasadena, CA 91103
robert.schroeder@usip.com
ebjorgum@usip.com**

- ☐ **BY MAIL:** I am readily familiar with the Firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on the same day with a postage thereon fully prepaid at Manhattan Beach, California, in the ordinary course of business. I am aware that, on the motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing shown on this proof of service.
- ☐ **BY FEDERAL EXPRESS/OVERNIGHT DELIVERY:** I caused a copy of such document to be sent via overnight delivery to the office(s) of the addressee(s) shown above.
- ☐ **BY FACSIMILE:** I caused a copy of such document to be sent via facsimile machine to the office(s) of the addressee(s) at the phone number(s) shown above.
- ☐ **BY PERSONAL SERVICE**
- ☐ **FEDERAL COURT:** I caused such envelope to be delivered by hand to the offices of the addressee(s).
- ☐ **STATE COURT:** I caused such envelope to be delivered by hand to the offices of the addressee(s).
- ☒ **BY E-FILEING:** Pursuant to Central District of California court order this case is designated for E- Filing. The document will be so E-Filed and a "Notification of E-Filing" will be e-mailed by the Court to all registered attorneys.
- ☒ **FEDERAL:** I declare, under penalty of perjury that the foregoing is true and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on April 14, 2008, at Manhattan Beach, California.


Steve Allen